



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 294 OF 2011

EUNICE WAIRIMU MUTURI.....1ST PLAINTIFF

WASHINGTON MUCHIRI MUTURI2ND PLAINTIFF

- VERSUS -

RUTH NYAMBURA CHUCHU..... 1ST DEFENDANT

ZIPPORAH WANGUI CHUCHU 2ND DEFENDANT

FLORENCE NJERI CHUCHU 3ND DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 30th June 2011. The plaintiffs pray for an injunction to restrain the defendants from selling, alienating or dealing with land reference number 36/111/222 situated in Nairobi. The application is brought under order 40 of the Civil Procedure Rules 2010 and supported by an affidavit of the 2nd plaintiff.

2. The plaintiffs are the son and widow of Gerald Muturi Maina, deceased. They hold a limited grant *ad litem* to the estate. They claim that the deceased had entered into a sale agreement for purchase of the land from the defendants on 19th March 2010. The defendants are the personal representatives of Chuchu Wataku, also deceased, who was the registered proprietor. The plaintiffs' case is that they are willing and able to complete the sale. However, they allege that the defendants have offered the property by way of resale to a third party. The plaintiffs submitted that they stand to suffer irreparable harm not compensable in damages. Hence the action for injunction.

3. The motion is contested. There are grounds of opposition dated 26th July 2011. The application is attacked for being superfluous and incompetent. The defendants also raise a three pronged objection: that the contract of sale was invalid for want of capacity; that there is material non-disclosure of the existence of an objection in High Court succession cause 1379 of 2006 *Re Estate of Chuchu Wataku*; and, that the court lacks jurisdiction to entertain this suit. Those matters are buttressed further in written submissions by the defendant dated 31st October 2011. The plaintiff in turn has filed submissions dated 3rd October 2011. I also invited both parties to address the court on salient matters arising out of the submissions.

4. I have heard the rival arguments. I take the following view of the matter. The parameters for grant of interlocutory prohibitive injunction are now well settled. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a

prima facie case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also The Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. This suit revolves around the agreement for sale dated 19th March 2010. On 10th January 2011, the purchaser, Gerald Muturi Maina, died. The plaintiffs obtained a limited grant *ad colligenda bona* on 31st May 2011. It was limited to power to defend two suits stated therein and for filing the present suit to enforce the sale agreement. Completion under the agreement was 90 days from the date of the contract. The deceased had paid 10 % of the purchase price of Kshs 2,300,000. The balance of Kshs 20,700,000 was payable on completion. Under clause 10, the purchaser was to provide a suitable undertaking for the balance.

6. Clause 4,5 and 6 of the agreement are material and provide as follows;

4. **THAT** the Vendors undertake to ensure removal of the prohibition order registered against the title on 12th August 1993 and to give a clear title.

5. **THAT** the Vendors also covenant that at the confirmation of the letters of administration they will include the purchaser herein as a beneficiary of the property herein to enable direct transfer thereof on the basis of the certificate of confirmation of grant as may be issued in the Succession Cause No. 1379 of 2006 in the estate of SOLOMON CHUCHU WATAKU.

6. **THAT** the Vendors also undertake to do all that is necessary to facilitate the transfer of the property herein in the purchaser's name at the earliest time possible.

7. The defendants contend that the sale contract was void because they had not acquired letters of administration to the estate of the vendor. The succession cause referred to in clause 5 of the agreement has not been determined. That may be an attractive argument. Reliance there was placed on the decisions in Gitau & 2 others Vs. Wandai [1989] KLR 231 and Re Estate of Erustus Njoroge Nairobi, High Court succession cause 1930 of 1997 (unreported). But upon closer scrutiny, it is a prosaic submission. It is defanged by the fact that parties were aware that the sale could not be completed until a grant of letters of administration intestate was confirmed. That is why the parties provided at clause 6 that the sale would be completed at the earliest opportunity. Time was not made of the essence. Secondly, the defendants offered to sell the property being well aware of their limited capacity. I do not see how the plaintiffs can be said to have intermeddled with the estate of the deceased when the vendors expressly admitted their limitation in the conveyance. They made the confirmation of grant a condition precedent to the sale. They took the deposit of Kshs 2,300,000. It is a substantial sum. I find it a cruel twist for the defendants to now use their limited capacity as both a spear and shield. They are keeping both the money and the land.

8. The defendants have not filed a replying affidavit. They have filed grounds of opposition and the written submissions I referred to. The averments of facts contained in the affidavit of Washington Muturi sworn on 30th June 2011 are thus uncontroverted. He avers that on 18th May 2011 the plaintiffs found some third parties on the suit property who claimed to be interested purchasers. Upon enquiry from the defendants' counsel, they received a reply dated 25th May 2011 wherein the defendants claimed the sale to the plaintiffs had fallen through. I have not seen any formal notice by the defendants to complete the sale. Clause 12 of the sale agreement had incorporated the Law Society conditions of sale (1989 edition). I readily find that the plaintiffs were entitled to a 21 days completion notice. In any event, the defendants concede they are handicapped by want of a confirmed grant. Time had not been made of the essence. They cannot rely on it to annul the sale. They cannot now be heard to say they have encountered challenges in getting a confirmed grant. It was within the contemplation of the parties that the sale was

conditional upon the issue of a valid confirmed grant.

9. In *Sagoo Vs Dourado* [1983] KLR 365 the court cited with approval *Halsbury's Laws of England*, 4th Edition, paragraph 481 as follows;

“The modern law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of essence unless:

- (1) The parties expressly stipulate that conditions as to time must be strictly complied with;*
- (2) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or;*
- (3) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence”.*

See also *Kazungu Karisa Vs Cosmos Angore Chanzeva* [2006] e KLR.

10. The defendants submit they attempted to refund the sale deposit. When I juxtapose that against the plaintiffs' averments, I reach the conclusion that the defendants intend to sell the land to third parties, perhaps for higher consideration. They have not rebutted the plaintiffs' claim that interested purchasers visited the property on 18th May 2011. Considering the limitations of capacity of the plaintiffs and defendants, I would have expected all the parties to proceed in utmost good faith. The defendants, from the evidence before me at this stage, do not impress me as being entirely forthright. The defendants' submissions refer to a caveat on the title lodged by the plaintiffs. The defendants case is that the present motion is thus superfluous. Unfortunately, those claims are not backed by any deposition. They remain claims from the bar. Lastly, the defendants take up cudgels on the capacity of the defendants to be sued in person. That perhaps will be the province of the trial court. For now, and in the absence of a confirmed grant, I find that the defendants personally represented themselves as the vendors. The plaintiffs can only look up to them for redress.

11. Granted those circumstances and the evidence, I find that the plaintiffs have established a strong *prima facie* case with a probability of success. I am thus minded to grant the plaintiffs an interlocutory prohibitive injunction. In the result, I order that an injunction do issue restraining the defendants whether by themselves, their agents, servants, employees or howsoever from selling, offering for sale, charging, leasing, subdividing, alienating or in any other manner dealing with land reference number 36/111/222 Nairobi until the hearing and determination of the suit.

12. The plaintiffs shall file a suitable undertaking as to damages. The main suit shall be heard and determined within 1 year in default of which the injunction shall lapse. I award the plaintiffs costs of the application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Nyamiaka for Mr. Oyugi for the Plaintiffs.
Mr. Wanga for Mr. Nduali for the Defendants.